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Supreme Court, U.S.
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No. 01-1502

In The

Supreme Court of the United States

ALLAN ELIAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction over the Resource Conservation and Recovery Act (RCRA) criminal charges because the federal RCRA laws had been replaced and supplanted by Idaho's own hazardous waste laws, pursuant to 42 U.S.C. § 6926(b)?

2. Whether the Government must prove that a sample from a large body of material is representative of the entire body in order to prove that a characteristic waste is a hazardous waste, subject to RCRA regulation?

3. Whether the Government's departure from a long-standing and consistently applied administrative practice, which would have determined that the material at issue was not a hazardous waste, violates the Constitutional fair notice requirement?

4. Where the defendant has shown jury tampering to have occurred during trial, is it the Government's burden to show no juror prejudice, or is it the defendant's burden to show actual juror prejudice?

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I. REPLY TO NEW ARGUMENTS RAISED IN GOVERNMENT'S BRIEF IN OPPOSITION

A. The Court Should Accept Review to Determine the Extent of Federal Criminal Jurisdiction Over Permit Violations in Authorized States.

While numerous courts, including this Court, have read the language of 42 U.S.C. § 6926(b) (an authorized state may "issue and enforce" permits "in lieu of" federal RCRA law) to mean that the federal program is "displaced" by state laws and regulations, the Government states that it means only that "permit applicants should submit their applications to the State rather than the EPA." (Opp.:11). Petitioner submits that a far greater difference was intended; the statute contemplates that the federal government cede not only the permitting system, but also the right to enforce State permits. *See Harmon Industries, Inc. v. Browner,* 191 F.3d 894, 899 (8th Cir. 1999) ("The plain 'in lieu of' language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects, including enforcement.") The need for this Court to resolve this issue has been heightened by the Tenth Circuit's September 4, 2002, holding in *United States v. Power Engineering Co.*, (10th Cir. No. 01-1217), where the court held, contrary to *Harmon*, that federal enforcement rights are not affected by state authorization pursuant to § 6926(b).

The EPA historically held the view that Congress intended that the State program would supplant the federal program pursuant to § 6926(b):

> If the federal hazardous waste regulations were to apply to handlers of hazardous waste in authorized states, those persons would be continuously subjected to a dual set of laws and regulations . . . Such dual regulation is presumably what Congress intended to phase out in an orderly manner when it adopted the provisions of Section 3006(b).

EPA Enforcement Memorandum, March 15, 1982, at 15-8. Since the State permittee can only be held to the laws, regulations, and penalties incorporated in the State permit, the EPA acknowledged the primacy of the State program, "The federal program, in effect, ceases to exist in that state." *Id.* at 15-13.

The Government notes that the RCRA statutory structure explicitly provides for a continuing federal role, even after a State program is authorized. (Opp.:9). However, the courts have long held that certain limited federal functions continue even in authorized states. *Washington v. EPA*, 752 F.2d 1465, 1467 (9th Cir. 1985).

The Government argues that the fact that actions taken by a State Administrator are treated as having the "same force and effect" as EPA actions (§ 6926(d)) implies that, "the federal government may bring an enforcement action based on state permit violation." (Opp.:10). However, rather than presupposing ongoing general enforcement activity by the federal government, the more logical reading of the statute is that in situations, such as those described in § 6928(a)(2) or any other retained power, where prior action by the permitting authority may be at issue, prior action in the state system is treated with equal dignity to that of the federal system.

A subordinate federal enforcement role is consistent with the State-federal partnership envisioned by Congress. RCRA establishes a system by which the federal government will establish *minimum* requirements. If State laws meet or exceed these federal requirements, the State is permitted to operate its own permitting system "in lieu of" the federal system. After authorization under § 6926, the federal government retains an oversight role to ensure that the federal minimum standards continue to be met in that State. However, there is simply no textual support for the Government's claimed "overarching authority to enforce Subtitle C [of RCRA] through criminal sanctions." (Opp.:14).

The most significant dispute between Elias and the Government, however, concerns the interpretation of the

phrase "under this subchapter." Citing the First Circuit's opinion in *United States v. MacDonald & Watson*, 933 F.2d 35 (1st Cir. 1991), the Government argues that the phrase is all-inclusive, covering not only federal permits issued pursuant to RCRA regulations (the "federal program"), but also state permits issued by state permitting systems, which were, in turn, specifically approved by the EPA pursuant to § 6926(b) (a "state program"). However, reliance upon *MacDonald*'s inclusive holding is unpersuasive because the decision failed to address the significance of the 1984 Amendments to § 6928.[1]

More fundamentally, the Government fails to address the two most cogent sources of authority regarding the proper articulation of the relationship between federal and state law. In *DOE v. Ohio*, 503 U.S. 607, 624-25 (1992), the Court considered whether penalties imposed pursuant to State environmental statutes approved by the EPA, and supplanting federal law, were penalties "arising under federal law" for purposes of the waiver of sovereign immunity. Despite the fact that the State environmental statutes had been "enabled" pursuant to an authorization scheme, the *DOE v. Ohio* Court held that the state penalty did not "arise under" federal law. Thus, after *DOE*, it is incorrect to claim, relying on *MacDonald & Watson*, that a permit issued pursuant to authorized State laws is a permit "under this [federal] subchapter" for purposes of § 6928(d).

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[1] The 1984 Amendment to 42 U.S.C. § 6928(d)(2) eliminated federal authority to criminalize violations of a State-issued permit. The amendment struck the parenthetical "(or section 6926 in case of a state program)" from (d)(2), while appending similar language to (d)(3), (d)(4) and (d)(5). The substituted phrase, "under this subchapter," cannot *subsume* both state and federal permits because an amended act cannot be viewed as a mere affirmation and clarification of an earlier statute. "It is a rule of law when revising a statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled." *Stewart v. Kahn*, 78 U.S. 493 (1871).

The Government attempts to distinguish *DOE v. Ohio* by claiming that this case is not about state law fines, but about federal criminal jurisdiction. However, the principle is identical; even when a State's exercise of power is expressly enabled by federal law, the rights and liabilities created by State law cannot be said to "arise under federal law." *DOE v. Ohio*, 503 U.S. at 625-626.

Likewise, the Government avoids discussing the "citizen suit" cases under § 6972(a)(1)(A), which consider whether there is federal court jurisdiction over citizen suits in authorized States. The governing statutory language provides for jurisdiction when there is a violation "under this chapter." While, as set out in the Petition, the cases have reached divergent results, the better reasoned cases have concluded that federal jurisdiction disappears. *See, e.g., Williamsburgh-Around-the-Bridge Block Ass'n v. Jorling*, 1989 WL 98631 (N.D. N.Y. 1989); *Thompson v. Thomas*, 680 F. Supp. 1, 3 (D.D.C. 1987).

B. The Court Should Accept Review to Determine the Scope of the Government's Requirement to Prove "Representativeness" in Civil and Criminal Environmental Cases.

In its Opposition, the Government fails to acknowledge the requirements of its own regulations, 40 C.F.R. § 261.23, that it must prove that its sample is representative of the average properties of the material "as a whole." The Government only argues that the sample itself was sufficient to support the conviction. (Opp.:19.) This misunderstanding was shared by the Ninth Circuit when it stated, "It was reactive and tested positive for cyanide. No further evidence is necessary." (269 F.3d 1013-14.) Those conclusions miscomprehend the purpose of the regulatory requirement of "representativeness."

Industrial process wastes differ from plant to plant, even in the same industry. It is quite common for there to be variation in uniformity and concentration, especially among reactive waste. 45 F.R. 33109. To avoid enforcement based on an anomaly, industry is regulated on the basis of

a "representative sample." "Representative sample" is thus a term of art, which provides industry with protection against having penalties imposed on the basis of accidental and unavoidable anomalies.

In some instances, courts have permitted the Government to prove "representativeness" with evidence that is deemed "equivalent" to that of a scientifically obtained sample. *See United States v. Hansen*, 262 F.3d 1217, 1241 (11th Cir. 2001). The average properties of the "whole or the universe" may be proved through inventories, hazardous waste logs, internal memoranda, etc.[2]

However, the Government did not offer such alternative evidence. Instead, it argues that since the victim was exposed to cyanide and that some samples were taken, which (under a newly-devised test) showed harmful levels of releasable cyanide, the samples themselves were sufficient to support the conviction. (Opp.:19). Citing portions of the transcript, the Government claims that its trial expert, Dr. Lowry, explained "how the sampling of the sludge, *under the circumstances*, was representative and there was no need to put those conducting the sampling at further risk by having them enter the tank to take more samples." (Opp.:21) (*Emphasis supplied.*) However, in the transcripts, Dr. Lowry only asserted that the samples were representative of the material *to which Dominguez was exposed*, as opposed to representative of the material as a whole. (Tr.:3010).[3]

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[2] The Government also cited *United States v. Baytank (Houston) Inc.*, 934 F.2d 599, 614 (5th Cir. 1991) and *United States v. Self*, 2 F.3d 1071, 1086-87 (10th Cir. 1993) in support of the use of grab samples. However, these cases involved "listed" hazardous substances, "EDB" and "MEK", respectively (the presence of any amount of which constitutes a violation); as distinguished from "characteristic" hazardous wastes which require the testing of a representative sample.

[3] The Government's alternative argument, that EPA investigators should not be put at risk to obtain truly representative samples, must be rejected. There were no exigent circumstances, and there was testimony by the Government's expert witness that sampling could

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Having failed to show that it obtained scientifically representative samples, the Government is forced to contend only that "there was ample evidence from which a rational jury could conclude that the samples exhibited the average properties of the waste . . . including all of the waste in the tank, and that the waste was hazardous." (Opp.:21.) By arguing that the cyanide-related injury suffered by the victim, together with the test result run from the limited samples obtained from the same region of the tank, constitute evidence of "representativeness" (Opp.:21), the Government implicitly concedes that it introduced *no evidence* showing that sample was "representative."

Even if it were proper to allow juries to decide whether a sample is statistically "representative" in the absence of expert guidance (how many samples? from how many discrete locations?), there is no evidence in the record from which the jury could have found that the sample was representative. Viewing the evidence in the light most favorable to the Government, the only evidence introduced was that the material from the samples, taken by investigators from near the opening of the 25,000 gallon tank, contained "hazardous" levels of cyanide. There was no evidence that the material in the tank was homogeneous, but rather an admission by the Government's expert that it was not. (Tr.: 3003, 3020). Thus, the jury had no evidence before it from which it could reasonably infer that the grab sample taken by Government investigators was "representative" as required by the regulations and case law.

While, as set out in the Petition, the regulations governing "characteristic wastes" (including "reactive cyanide wastes") under RCRA employ this term, the phrase is

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have been done safely. Tr: 2474-2475. There is no exception to the regulatory requirement that a "representative sample" be obtained in situations where the material is potentially dangerous. And such an exception would be nonsensical, given EPA's role in regulating *hazardous* wastes.

not unique to reactive waste, RCRA, or even environmental law. A Westlaw search of the Code of Federal Regulations reveals that 450 different regulations employ that term, from tobacco inspection to product safety, and from liquor to fisheries. Less than a third of these regulations are environmental regulations, and only a fraction of these relate to RCRA.

The Ninth Circuit's rejection of the content of the "representativeness" requirement in waste disposal cases renders illusory the protections afforded the regulated community by the scientific standard inherent in the term "representative sample." The plain meaning of literally hundreds of regulations is at stake, and Certiorari should be granted to clarify the meaning of this widely-used term.

C. The Court Should Accept Review to Determine Whether a Regulation Defining a Crime Can Depart from the Intelligible Principle of the Statute and Regulations and Prior Administrative Practice.

The only "ascertainable standard" relating to releasable cyanide was set out in the SW-846 testing protocol. Without the scientific criteria of the SW-846 protocol, the prose definition of "reactive cyanide-bearing waste" does not conform to the mandate of 42 U.S.C. § 6921(b)(1) that a material be subject to regulation only if it contains wastes "at levels in excess of levels" set out in published thresholds. The EPA has interpreted this requirement to mean that the characteristic "be capable of being defined in physical, chemical or other properties measurable by standardized and available testing procedures." 45 F.R. 33105.

Without the standardized testing protocol set out in the SW-846 reactivity tests, the narrative reactivity regulation does not meet the statutory requirement of setting out a measurable tolerance, or providing fair notice to the regulated community.

The Government fails to address that, in a series of cases, the D.C. Circuit has ruled that agency's regulations and other public statements are taken into account in

determining whether regulators have provided the regulated community with information sufficient to identify with ascertainable certainty the standard to which the agency expects the community to conform, *General Electric Company v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("*GE*"); *Rollins Environmental Services v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991); *Meehan v. Macy*, 392 F.2d 822, 838-839 (D.C. Cir. 1968). These cases are significant, because they limit the civil and criminal penalties that agencies can seek to impose when the agency has announced a *de facto* standard to the regulated community.

After the events in this case, the Government employed the SW-846 test for releasable cyanide to determine if the material from the tank was hazardous. However, the SW-846 test results did not support the Government's theory. To prosecute Elias, the Government had to resurrect a test that the EPA had previously rejected as a replacement for the SW-846 test.[4] This was an unfair departure and violated the fair notice requirement, and the Court should accept review in order to determine whether an agency is bound by its previously-announced informal standards.

D. The Court Should Accept Review to Determine Whether, When Jury Tampering is Found to have Occurred, it is the Government's Burden to Show No Reasonable Possibility of Prejudice, or Whether it is the Defendant's Burden to Establish Prejudice.

The Government attempts to salvage the Ninth Circuit's ruling that the defendant is allocated the burden

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[4] The Ninth Circuit trivialized the SW-846 test, stating, "growing dissatisfaction with it prompted EPA to remove it." 269 F.3d at 1016. However, that statement is incorrect, as the SW-846 reactivity test has never been removed. *See* http:www.epa.gov/epaoswer/hazwaste/test/9xxx.htm.

of demonstrating bias in a jury tampering case by arguing that the Ninth Circuit really considered two distinct issues, (1) whether there was jury tampering, and (2) the "closely related" issue of whether the defendant had shown jury bias. (Opp.:24). The Government suggests that the Ninth Circuit placed the burden on the defendant only with respect to the "jury bias" determination.

Unfortunately, the Government's theory does not square with what the Ninth Circuit understood to be the issue before it. Rather than reviewing the evidence to determine if the Government had proven "beyond a reasonable doubt" that "there was no reasonable possibility that the jury could have been affected," the Ninth Circuit viewed the entire matter as a juror bias case. The entirety of the Court's discussion of the issue is set out as follows:

> Because the district court held extensive evidentiary hearings and made findings of fact, we review the findings of fact to determine whether they are 'clearly erroneous.'" [FN69] There is no evidence that they are. By far, the most difficult thing to understand is how, if Scott merely said that Elias had greeted her, two people came to believe he had suggested a bribe, jokingly or otherwise. There is no satisfactory explanation. The fact remains, however, that both jurors testified that whatever they thought Elias had said, he had said jokingly. They testified that it did not preoccupy them at the time, frighten them, or distract them from focusing on the evidence. In light of this, the district court's conclusion that Elias had not borne his burden [FN70] of showing juror bias appears correct. Accordingly, we affirm the district court's denial of Elias's motion for a new trial.

269 F.3d at 1020-1021. (Footnotes omitted).[5]

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[5] Both footnotes reference cases concerning the allocation of the burden in "juror bias" cases (*Sea Hawk Seafoods, Inc. v. Alyeska*

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All Elias had to show was that there was a "reasonable possibility" that this perceived *ex parte* contact by Elias affected the jury. The Ninth Circuit's puzzlement at how jurors came to believe that a greeting contained a bribe offer demonstrates that the Government did not demonstrate, beyond a reasonable doubt, that the attributed statement had no affect.

This Court should grant Certiorari to resolve the conflict between those Circuits which place the burden of demonstrating prejudice in a jury tampering case with the Defendant, and those which allocate the burden of demonstrating no prejudice to the Government.

II. CONCLUSION

This Court should grant a Writ of Certiorari.

RESPECTFULLY SUBMITTED this 17th day of September, 2002.

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Pipeline Serv. Co., 206 F.3d 900, 911 (9th Cir. 2000); *United States v. Hanley*, 190 F.3d 1017, 1030 (9th Cir. 1999); and *Dyer v. Calderon*, 151 F.3d 970, 975 (9th Cir.1998) (*en banc*)), where the burden is allocated to the defendant, rather than jury tampering cases.